APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES HENRY
Appellant

vs.

UNITED STATES OF AMERICA
Appellee

FILED
Nov. 9 1966
WM. B. LUCK, *Clerk*
No. 20322

Order on Motion

BEFORE: BARNES AND KOELSCH, Circuit Judges, TAYLOR, District Judge

Good cause appearing therefore, IT IS ORDERED, that the judgment herein, issued on July 8, 1966, be, and it hereby is, recalled.

STANLEY W. BARNES

M. OLIVER KOELSCH
U.S. Circuit Judges

FRED M. TAYLOR
U.S. District Judge

APPENDIX B

Statutes and Constitutional Provisions Involved

Title 18, Section 659, U.S. Codes:

§ 659. Interstate or foreign baggage, express or freight; State prosecutions

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or

has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods, or chattels.

The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender.

To establish the interstate or foreign commerce character of any shipment in any prosecution under this section the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made.

A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution under this section for the same act or acts. June 25, 1948, c. 645, 62 Stat. 729; May 24, 1949, c. 139, § 13, 63 Stat. 91.

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX C

James HENRY, Appellant,

v.

UNITED STATES of America, Appellee.

No. 20322.

United States Court of Appeals

Ninth Circuit.

May 23, 1966.

Rehearing Denied June 30, 1966.

Prosecution for knowingly receiving and possessing goods stolen from interstate commerce. The United States District Court for the Southern District of California, Central Division, Peirson Hall, J., entered judgment of conviction, and defendant appealed. The Court of Appeals, Barnes, Circuit Judge, held that fact that trial judge urged jury to return a verdict and stated that they should be able to decide the case did not constitute pressure exceeding permissible bounds.

Affirmed.

1. Receiving Stolen Goods 3(4)

Evidence, including fact that defendant usually asked for bill of sale when purchasing merchandise, but did not do so, entitled jury to infer that defendant had necessary knowledge that goods had been stolen. 18 U.S.C.A. § 659.

2. Criminal Law 1159(3)

Court of Appeals was not authorized to interfere with jury's conclusions on contested issue of fact.

3. Criminal Law 365(1)

That trial judge urged jury to return a verdict and stated that they should be able to decide the case did not constitute pressure exceeding permissible bounds.

Saul J. Bernard, Los Angeles, Cal., for appellant.

Manuel L. Real, U. S. Atty., John K. Van De Kamp, Asst. U. S. Atty., Chief, Crim. Div., J. Brin Schulman, Asst. U. S. Atty., Asst. Chief, Crim. Div., Anthony Michael Glassman, Asst. U. S. Atty., Los Angeles, Cal., for appellee.

Before BARNES and KOELSCH, Circuit Judges, and TAYLOR, District Judge.

BARNES, Circuit Judge.

Appellant Henry, jointly with the defendant Fuller, was charged with and convicted of knowingly receiving and possessing twenty-two packages of pressure regulators which had been stolen from an interstate shipment of goods. (18 U.S.C. § 659.)

Error is claimed in five particulars: (1) the insufficiency of the evidence that appellant *knew* the goods had been stolen; (2) that the trial judge coerced the verdict; (3) that the appellant was required to defend his innocence as to other stolen items; (4) that a new trial should have been granted upon the ground of newly discovered evidence; and (5) that there was prejudicial misconduct by the United States Attorney in his summarization to the jury.

We find the only point of any substance is the first. Obviously, there could be no direct evidence, save from the appellant himself, as to his state of mind — whether

he knew or did not know the merchandise was stolen. He testified on his own behalf, but was not asked, nor did he testify, whether or not he knew the regulators were stolen.

[1] Such lack of direct evidence, however, does not end the matter. There were various facts in evidence which, if believed by the jury, entitled it to infer appellant had the necessary knowledge.

First: there was testimony the appellant obtained new cardboard cartons in which to place that which he described as "junk" in order to "move" it. One Persley testified "Mr. Henry explained to me they couldn't be moved in the containers they were in." (R.T. 49) "Henry asked me to get the new cartons." (R.T. 68) Persley "knew" the regulators were stolen property. (R.T. 68) Significantly appellant, taking the stand after Persley had testified, denied some of Persley's testimony, but was not asked on direct anything about the containers, or the change thereof.

Second: the appellant received no bill of sale when he acquired the merchandise.

Third: Persley intended to junk the regulators; it was the appellant's idea to sell them.

Fourth: appellant sold the regulators before he had bought them, or paid for them.

Appellant dismissed the first item above as "beside the point." We do not think so. He states the second "shows nothing." We may agree "not much," but we cannot so easily reduce it to zero in evidentiary value. Item three above is disposed of by appellant in his brief by the suggestion that "it was probably misconstrued by the jury."

We think, for example, that the second item is strengthened as circumstantial evidence by the facts: (a) the appellant usually gave a bill of sale when selling merchandise, but here gave none. (b) The appellant usually asked for a bill of sale when purchasing merchandise, but here asked for none. (c) No records were kept of any purchases or sales of merchandise. (Tr. p. 219) (d) The testimony of Persley, alone, if believed, raises a strong inference appellant knew the merchandise was stolen. The appellant urges that the jury "did not properly receive" the testimony of Persley. This is difficult to establish, as a point of law, and boils down to nothing more than counsel's surmise.

[2] All this leads us to the conclusion appellant here attacks a contested issue of fact, decided adversely to appellant by the jury. With such conclusion we are not authorized to interfere. Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); Carroll v. United States, 326 F.2d 72, 75 (9th Cir. 1963).

[3] The trial judge did urge the jury to return a verdict. He did state that they should be able to decide the case, and some little psychological pressure was put on the jury. But such "pressure," if it is that, occurs in many courts on innumerable occasions. Only when it exceeds permissible bounds does it become error. We cannot conclude it exceeds such bounds here.

We find no merit in the other points urged on appeal.

We affirm.